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No. 85-954

In the Supreme Court of the United States

OCTOBER TERM, 1985

JAPAN WHALING ASSOCIATION AND
JAPAN FISHERIES ASSOCIATION, PETITIONERS

v.

AMERICAN CETACEAN SOCIETY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

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Petitioners Japan Whaling Association and Japan Fisheries Association seek review of a decision holding that the Secretary of Commerce has an automatic, nondiscretionary duty to certify that Japan has diminished the effectiveness of the International Convention for the Regulation of Whaling (ICRW), 62 Stat. 1716 *et seq.* (*entered into force* Nov. 10, 1948). That certification would lead to the imposition of severe economic sanctions against Japan. The federal respondents have also petitioned for certiorari in this case. See *Baldrige* v. *American Cetacean Society*, petition for cert. pending, No. 85-955 (filed Dec. 4, 1985).

1. Japan, an important foreign ally culturally and historically committed to whaling, presently declines to follow ICRW whale harvesting quotas. However, Japan has entered into an agreement with the United States which is to culminate in the withdrawal of its objections to the treaty

quotas and the termination of its commercial whaling activities by April 1, 1988 (Pet. App. D1-D8). That agreement has failed to satisfy various private wildlife organizations. They brought a mandamus action against the Secretary of Commerce and the Secretary of State, demanding certification and sanctioning of Japan under Section 8(a) of the Fishermen's Protective Act of 1967 (the Pelly Amendment), 22 U.S.C. 1978(a), and Section 201(e)(2) of the Magnuson Fishery Conservation and Management Act (the Packwood Amendment), 16 U.S.C. 1821(e)(2).[1]

Petitioners intervened as defendants in that action. The district court ruled that the Secretary of Commerce has a nondiscretionary duty to certify Japan (Pet. App. B1-B47). The government and petitioners took separate appeals from that decision. The court of appeals consolidated those appeals and affirmed (*id.* at A1-A50).[2]

2. As we explain more fully in our pending petition (see 85-955 Pet. 10-23), this Court should correct the court of appeals' erroneous decision on this important matter. The express language of the Pelly and Packwood Amendments grants the Secretary substantial discretion in determining whether a country has diminished the effectiveness of the ICRW (see *id.* at 11-13). The legislative history supports this interpretation (see *id.* at 13-18). And even if the language and legislative history were unclear, the Secretary's interpretation of the statute would be entitled to controlling

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[1]The Pelly and Packwood Amendments provide that the Secretary of Commerce shall certify if the nationals of a foreign country are conducting whaling operations in a manner that "diminishes the effectiveness" of the ICRW. 16 U.S.C. 1821(e)(2); see 22 U.S.C. 1978(a). Certification results in the mandatory imposition of severe economic sanctions. See 16 U.S.C. 1821(e)(2)(B). See also 22 U.S.C. 1978(a)(4).

[2]The facts are set forth in greater detail in the goverment's petition. See 85-955 Pet. 3-10.

weight (see *id.* at 18-19). Moreover, like petitioners, we contend (*id.* at 19-20) that mandamus is inappropriate in this case.

Although we agree with much of petitioners' submission, we disagree on one basic point. Petitioners seemingly contend (Pet. 3, 20-22) that the Secretary cannot certify an ICRW member country that has filed a valid objection, pursuant to the ICRW's provisions, excepting the country from compliance with the harvest quotas.[3] They suggest (Pet. 20-22) that certification is inconsistent with both the United States' treaty obligations under the ICRW and with the Pelly and Packwood Amendments. In contrast to the respondent wildlife organizations, who argue that the Secretary *must* certify a country whenever its nationals do not comply with an ICRW quota, petitioners contend that the Secretary may *never* certify a country that has filed a valid objection.

Petitioners maintain (Pet. 21) that certification of a nation that is not in technical violation of the ICRW undermines rights secured by the treaty. But nothing in the ICRW forbids individual nations from adopting measures, as part of their domestic law, that impose more stringent obligations on ICRW members than the ICRW itself provides. Congress, in recognizing treaty rights, may nonetheless attach adverse consequences to their exercise. See *Moser* v. *United States*, 341 U.S. 41 (1951). In the present situation, Congress has authorized the Executive Branch to determine if whaling activities — whether or not permissible under the ICRW — diminish the ICRW's effectiveness.

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[3]The ICRW provides that a member country may object to a harvest quota; if the country files a timely objection, it is excused from compliance with the quota. See ICRW art. V, 62 Stat. 1718-1719.

Congress's action, promoting the implementation of the ICRW, is wholly consistent with the ICRW's goals.[4]

Thus, on this basic statutory question, the sharply contrasting positions advanced by petitioners and the respondent wildlife organizations are both unsound. Congress has carefully steered a middle course between those extremes. The Pelly and Packwood Amendments authorize the Secretary to exercise discretion in determining what activities diminish the effectiveness of the ICRW; they neither prohibit nor require certification of countries that permit whaling, under valid objection, in excess of ICRW quotas. Instead, they entrust the certification decision to the Executive Branch as a matter of informed foreign policy and conservation judgment.

3. The court of appeals' decision primarily presents questions of Executive Branch discretion in matters of foreign relations. As petitioners recognize (Pet. 13), the government is best situated to address those questions authoritatively. In our view, however, petitioners, who have been active in this case since its inception and present questions similar to those presented in the government's petition, would add a useful perspective to the Court's consideration of the case.

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[4]Indeed, the legislative history reveals that Congress understood that the Executive Branch would have discretion to certify nations that, while complying with treaty requirements, nevertheless take actions that diminish the treaty's effectiveness. See H.R. Rep. 92-468, 92d Cong., 1st Sess. 5 (1971); *Fishery Conservation and Management Act: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 317 (1979).

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, together with the government's petition in No. 85-955, and that the cases should be consolidated for this Court's review.

CHARLES FRIED
Solicitor General

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